BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROZELLA M. KEEVER	)	
Claimant	)	
VS.	)	
	)	Docket No. 196,667
CESSNA AIRCRAFT COMPANY	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent appealed an Award of Administrative Law Judge John D. Clark dated December 18, 1995. The Appeals Board heard oral argument by telephone conference on May 2, 1996.

APPEARANCES

Claimant appeared by her attorney, James B. Zongker of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Edward D. Heath, Jr. of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Chris Cole of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the December 18, 1995 Award.

ISSUES

The respondent requested Appeals Board review of the following issues:

(1) Nature and extent of claimant's disability.

(2) The extent, if any, of the liability of the Kansas Workers Compensation Fund (Fund).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, considering the briefs and hearing the arguments of the parties, the Appeals Board finds as follows:

(1) The Administrative Law Judge found claimant was entitled to a 97 percent work disability. The Administrative Law Judge based the work disability percentage on Dr. Schlachter's opinion that claimant's work-related injuries resulted in a loss of 94 percent of her task performing ability and a 100 percent wage loss because claimant had not found substantial and gainful employment since her work-related injuries caused her to leave her employment with the respondent on April 20, 1994. The Administrative Law Judge averaged these factors as required by statute and awarded claimant a 97 percent permanent partial general disability based on a work disability. *See* K.S.A. 44-510e(a).

Respondent argued that the Administrative Law Judge should have considered the testimony of Karen C. Terrill, a vocational expert, when he determined the amount of claimant's work disability. Ms. Terrill testified, using Dr. Schlachter's restrictions, that claimant would have had a 55 percent loss in her task performing ability over the last 15 years. Ms. Terrill also testified, utilizing Dr. Melhorn's restrictions, that claimant would have a loss of 25 percent of her task performing ability. Respondent asserted that these two task loss percentages should have been given equal weight to arrive at a task performing loss in the amount of 40 percent. Thus, the respondent contended claimant's appropriate work disability should have been 70 percent found by averaging her 100 percent wage loss with her 40 percent task loss.

The Administrative Law Judge listed Ms. Terrill's deposition as part of the evidentiary record in this case. However, he did not give Ms. Terrill's testimony any weight when deciding the amount of claimant's work disability. The Appeals Board agrees and finds that the testimony of vocational expert, Karen C. Terrill, on the issue of claimant's loss of ability to perform work tasks should not be given any weight in this case. The Appeals Board finds that this testimony had no probative value because it fails to meet the statutory requirement that such an opinion must be expressed by the physician. *See* K.S.A. 44-510e(a).

Accordingly, the Appeals Board affirms the Award of the Administrative Law Judge that entitled the claimant to a 97 percent permanent partial general disability based on work disability. The Administrative Law Judge set out his findings of fact and conclusions of law in some detail concerning this issue. Therefore, the Appeals Board finds it is not necessary to repeat those findings and conclusions in this Order. Because the findings

and conclusions of the Administrative Law Judge are found to be accurate and appropriate, the Appeals Board adopts them as its own.

(2) The Administrative Law Judge found that the respondent failed to prove that the Fund had any liability for the award in this matter. Respondent argued that it had presented evidence through the testimony of Dr. Schlachter that claimant would not have needed surgery and she would not have sustained the amount of physical impairment she did, but for claimant continuing to work after the initial incident at work which caused her hands to swell on January 31, 1994. Liability for benefits awarded in a workers compensation case cannot be shifted to the Fund unless the respondent proves that it either employed or retained a handicapped employee with knowledge of a preexisting impairment. *See* Hinton v. S.S. Kresge Co., 3 Kan. App. 2d 29, 592 P.2d 471, rev. denied 225 Kan. 844 (1978). If the employee's injury or disability would not have occurred "but for" or was contributed to by the preexisting impairment, then all or a portion of the benefits shall be paid by the Fund. *See* K.S.A. 44-567. An employee is defined as being handicapped if the employee is afflicted with or subject to any physical or mental impairment, or both, of such a character that the impairment constitutes a handicap in obtaining and retaining employment. *See* K.S.A. 44-566. The Appeals Board finds, for the reasons set forth below, that the decision of the Administrative Law Judge, finding that the Fund had no liability in this case, is appropriate and should be affirmed.

Prior to the testimony being taken at the regular hearing, the respondent stipulated that claimant had met with personal injury by accident while employed by the respondent and that the claimant's date of accident was her last day worked, April 20, 1994. Although the Administrative Law Judge, in his Award, indicated that the parties had stipulated to the dates of accident of January 31, 1994 through April 20, 1994, the Administrative Law Judge found that the appropriate date of accident was claimant's last day worked, April 20, 1994. Claimant suffered from bilateral carpal tunnel syndrome alleged to have resulted from her work activities over a period of months. Claimant suffered an initial trauma and then her condition worsened to the point she had to leave work because she could no longer perform her work activities due to the carpal tunnel syndrome condition. The Appeals Board adopts the Administrative Law Judge's finding that the appropriate date of accident in this matter is April 20, 1994 which is consistent with the "bright line rule" announced in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

Having found the date of accident of April 20, 1994, the Appeals Board finds that the respondent, in order to prove Fund liability, had to present credible evidence that it had knowledge that claimant had a preexisting impairment which constituted a handicap prior to April 20, 1994. The claimant testified that she had no problems with her hands and wrists prior to pushing the wing assembly with another employee on January 31, 1994. Dr. Schlachter testified that claimant, by continuing to work, aggravated a problem that began because of the January 31, 1994 incident. Dr. Schlachter opined that "but for" claimant's continuing to work, she would not have needed surgery and she would not have sustained the full extent of her resulting functional impairment. Therefore, the Appeals Board finds that Dr. Schlachter's testimony, coupled with the claimant's testimony, established that the

claimant did not have a physical impairment at the time of the January 31, 1994 incident. It was only after claimant continued to perform her work activities over the next few months that her carpal tunnel syndrome condition worsened to the point that she needed surgery resulting in physical impairment. Claimant established that after the January 31, 1994 incident she worked at her regular job duties without restrictions until she could no longer perform the job duties on April 20, 1994 because of her carpal tunnel syndrome condition. Respondent also contended that Dr. Schlachter's testimony satisfied its burden of proving claimant's injury probably or most likely would not have occurred but for her preexisting impairment. The Appeals Board disagrees with the respondent and finds that Dr. Schlachter's answers to respondent's questions on cross-examination did not satisfy the "but for" test contained in K.S.A. 44-567. Dr. Schlachter answered in the affirmative that claimant's need for surgery and resulting disability would not have occurred but for her continuing work activities after the incident of January 31, 1994. However, the Appeals Board finds that the "but for" test can only be satisfied if evidence is presented that the employee's injury or disability would not have occurred but for her preexisting impairment. The test cannot be satisfied, as the respondent attempted, by presenting evidence that the employee's injury or disability would not have occurred but for the subsequent accident or series of accidents. *See* K.S.A. 44-567; Barke v. Archer Daniels Midland Co., 223 Kan. 313, Syl. ¶ 1, 573 P.2d 1025 (1978).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated December 18, 1995 should be, and is hereby, affirmed in all respects.

All other findings and orders of the Administrative Law Judge in his Award dated December 18, 1995 are adopted by the Appeals Board as if specifically set forth in this Order.

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Edward D. Heath, Jr., Wichita, KS

Chris Cole, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director